Supreme Court, U.S.
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No. 09-278

In The
Supreme Court of the United States

JOSE A. RIVAS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF

MARC D. MEZIBOV
Counsel of Record
STACY A. HINNERS
LAW OFFICE OF MARC MEZIBOV
401 E. COURT STREET, SUITE 600
CINCINNATI, OH 45202
(513) 621-8800

Counsel for Petitioner

October 19, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTRODUCTION

The State of Ohio contends that certiorari should not be granted in this case because Petitioner's claim does not implicate the United States Constitution. To support this assertion, the State relies upon a misapplication of the relevant case law and attempts to obfuscate the record by mischaracterizing Petitioner's narrowly tailored pre-trial discovery request as nothing more than a "fishing expedition" which would compromise the State's interest in protecting its confidential law enforcement investigatory records.

In addition to the factual and legal inaccuracies in the State's argument, its position overlooks fundamental principles of fairness deeply rooted in the Fourteenth Amendment's Due Process Clause and this Court's constitutional jurisprudence. Specifically, it fails to recognize that Ohio's new rule of discovery will effect a significant shift in the delicate balance of power between the prosecution and criminal defendant that will leave the accused without meaningful recourse to challenge the validity, authenticity or accuracy of the evidence presented against him at trial. Such a rule, if permitted to stand, will clearly abridge criminal defendants' well established constitutional right to mount a complete defense.

Under these circumstances, the Petition should be granted, the ruling of the Ohio Supreme Court overturned and this matter remanded for further proceedings.

I. PETITIONER WAS DENIED A FUNDAMENTAL RIGHT SECURED BY THE UNITED STATES CONSTITUTION.

A. Petitioner's request to inspect the hard drive was not a fishing expedition but rather a specific request for material evidence.

The State paints Petitioner's request to inspect the police department's computer hard drive as an attempt to gain unfettered access to the State's investigative files and cites an abundance of case law supporting its position that such broad requests are impermissible under the rules of discovery. Opp. 10-11. However, because Petitioner's request was both pointed and material, the State's argument in this regard should be rejected.

Prior to trial, Petitioner specifically requested to inspect the prosecution's computer hard drive because he believed that the electronic information generated by that hard drive had been altered and that the computer printout provided to him did not accurately reflect his online conversation with the undercover police officer. The request was material because if, as Petitioner has steadfastly asserted, the hard drive indicated that the police officer had actually represented the age of Molly to Petitioner as 41 instead of 14, such evidence could reasonably put the State's charges of Importuning and Unlawful Sexual Conduct with a Minor "in a different light" and undermine a jury verdict arrived at in the absence of such evidence. See *Cone v. Bell*, 129 S.Ct. 1769, 1783 (2009).

Under this set of facts, it is clear that Petitioner was not merely engaging in a fishing expedition for potentially relevant information nor was he requesting unfettered access to the State's confidential files. Opp. at 10. Rather, Petitioner was requesting to inspect the physical evidence to be used against him in the prosecution's case in chief which was material to his guilt or innocence and in the exclusive possession and control of the State.

Despite the language in Ohio Crim.R.16(B)(1)(C) granting a criminal defendant the right to inspect items "material to the preparation of his defense," and the apparent materiality of the hard drive, the prosecution refused to allow Petitioner to inspect the original source of the data. The Ohio Supreme Court affirmed this decision, ruling that in order to obtain discovery Petitioner must first make a prima facie showing that the computer printout was "false, incomplete adulterated or spoliated" before being permitted to inspect the evidence.

B. This Court has the power to overturn the Ohio Supreme Court's unconstitutional interpretation of a state criminal rule of procedure.

The State asserts that because the Ohio Supreme Court determined that the prosecution complied with Ohio's rules regarding pre-trial discovery, this is necessarily "not a case involving a denial of due process." Opp. 3, citing *State v. Rivas*, 121 Ohio St.3d 469 at ¶18. While petitioner recognizes that it is generally within the power of the states to regulate procedures under which their criminal laws are carried out, this policy does not wholly free state rules

of criminal procedure from constitutional scrutiny. See *Patterson v. New York*, 432 U.S. 197, 202 (1977); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

Rather, "cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas*, 385 U.S. 554, 563-564 (1967). State rules and decisions that "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" will be deemed to violate the Due Process Clause of the Fourteenth Amendment. *Speiser v. Randall*, 357 U.S. 513, 523 (1958).

Further, much of this Court's hesitation to intervene in the states' administration of their individual criminal justice systems derives from a desire to "exercise substantial deference to legislative judgments in this area." *Medina v. California*, 505 U.S. 437, 446 (1992). In this instance, however, Petitioner is not requesting that the Court overturn a legislative enactment, but rather correct an error of constitutional magnitude made by the highest court of the state in interpreting a rule of procedure. As the three dissenting state court justices recognized:

> There is no justification for creating, as the majority opinion does, a permanent judicial gloss over the plain language of the discovery rules to short-circuit defendant's discovery request. Moreover, imposing such a standard ignores the plain language of the rule by imposing obligations on the defendant beyond the rule's "materiality" standard. *State v. Rivas*, 121 Ohio St.3d 469 at ¶23.

Under these circumstances, it is clear that Ohio's new judicially created rule of criminal procedure can—and indeed should—be scrutinized by this Court to determine whether it comports with the fundamental fairness requirements rooted in the United States Constitution.

C. The Supreme Court of Ohio's reformulation of Ohio Rule of Criminal Procedure 16 violates the Due Process Clause of the Fourteenth Amendment.

The State maintains that Ohio's new rule of discovery requiring a criminal defendant to show that a computer printout is false, incomplete adulterated or spoliated" before being permitted to see the original source of the data is not violative of the Due Process Clause." Opp. at 9-12. However, this analysis fails to acknowledge the role of due process in maintaining a balance of power in criminal proceedings—a balance that has now been unconstitutionally shifted in favor of the State.

It is well settled that the Due Process Clause "speak[s] to the balance of forces between the accused and the accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973), citing *In re Winship*, 397 U.S. 358, 361-364 (1970). To maintain this balance, Courts and legislatures have endeavored to craft rules of discovery and procedure which afford criminal defendants the tools needed to ensure that they receive "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Indeed, "the State's inherent information gathering advantages suggest that if there is to be any imbalance in

discovery rights, it should work in the defendant's favor." *Wardius*, 412 U.S. at Fn9.

Under these principles, virtually every jurisdiction in the United States permits a criminal defendant to inspect evidentiary materials in the State's possession so long as the evidence is material to the preparation of the defense and is intended for use at trial by the prosecuting attorney. However, the Supreme Court of Ohio has now unilaterally imposed a new and substantially increased evidentiary burden on a defendant's entitlement to pretrial discovery. In many cases, this burden will operate as a barrier to constitutionally mandated pre-trial discovery.

Under Ohio's new rule, in order for Petitioner to access the police department's hard drive so that he may determine whether the computer printout says what the police say it says, Petitioner must first make a prima facie case showing that the print out was "false, incomplete adulterated or spoliated." However, the only means to meaningfully dispute the accuracy of the printout would be to inspect the computer hard drive.

Thus, far from an "easily attainable burden on a defendant," the new rule requires Petitioner to make an impossible showing. See Opp. at 5. Under these circumstances, the Petitioner is left without recourse to inspect the most crucial piece of evidence against him and the prosecutor is improperly cast "in the role of an architect of a proceeding that does not comport with the standards of justice." *Brady v. Maryland*, 373 U.S. 83, 88 (1963). A judicially created rule which so heavily burdens an defendant's liberty interest in defending his case clearly threatens the principles of

fundamental fairness and balance underlying this country's criminal justice system.

This would not be the first occasion on which this Court has determined that the Due Process Clause is implicated by a state's denial of a request for pre-trial discovery. In *Pennsylvania v. Ritchie*, a defendant facing charges of child abuse requested a copy of the Department of Youth Services' file regarding the alleged minor victim to determine whether it contained impeachment evidence or other material relevant to his defense. 480 U.S. 39 (1987). Because neither the defense, prosecution or trial court had actually looked at the file, this Court found that the fundamental fairness requirements of the Due Process Clause required the trial court to conduct an in camera inspection of the file to determine whether it contained material evidence. Id. at 58. Under *Ritchie*, where, as here, the prosecution has made no representation that it actually checked the computer hard drive to determine its content, due process requires the trial court to inspect the hard drive to determine whether it contained evidence favorable to Petitioner.

The State's failure to verify the contents of the computer hard drive also defeats its contention that *Brady v. Maryland*, 373 U.S.83 (1963) resolves the issue in this case. Under *Brady*, the prosecution has a duty to disclose all evidence it deems favorable to the defense. Id. However, "this in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Here, where there is no evidence in the record to show that the prosecutor made any effort to inspect the hard

drive to determine the police officer's veracity, the State cannot be deemed to have met its burden to inspect the evidence under *Kyles*. To rule otherwise may encourage lax investigation by prosecutors eager for a conviction.

In short, the Supreme Court of Ohio now accords a judicially sanctioned deference to the credibility of physical evidence and testimony offered by prosecution and law enforcement officials. Because such deference is wholly inconsistent with principles concerning balance of power in criminal proceedings found in the Due Process Clause and this Court's jurisprudence, the Ohio Supreme Court's decision should be overturned on the basis that it violates the United States Constitution.

II. THE STATE'S INTEREST IN PROTECTING ITS RECORDS NEED NOT BE UNREASONABLY COMPROMISED.

The State claims that Petitioner should be denied the opportunity to inspect the police department's computer hard drive because permitting him to do so would compromise the security of the State's investigative files. Opp. at 3. However, because the information the State endeavors to protect can be easily shielded, the State's interest in total electronic privacy is clearly outweighed by Petitioner's Due Process right to inspect the physical evidence that will be used against him at trial.

Federal and state rules of criminal procedure, including those in Ohio, reflect a conscious and deliberate effort by the legislatures to strike a fair balance between the defendant's need to know and the

state's need to withhold evidence the disclosure of which might jeopardize well founded security or privacy interests. These rules contain restrictions and limitations on a defendant's entitlement to pretrial discovery. See e.g., Ohio Rules of Civil Procedure Rule 16e(1) and (2). The use of protective orders and the establishment of conditions on the time, place and manner of the defendant's inspection of evidentiary materials in the prosecutor's possession are more than commonplace; they are routinely invoked to maintain a reasonable balance between the needs of the prosecution and those of the defendant.

Among the procedural devices adopted by courts to maintain the balance of interests is the opportunity for both sides to have evidentiary materials subjected to an in camera review by the trial judge. See, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), supra. In this case—as an intermediate Ohio appeals court held—the trial judge could and should have independently examined the content of the police department's hard drive to determine whether it contained favorable evidence. Such an order would fairly vindicate Petitioner's due process right without comprising the State's interest in electronic privacy.

CONCLUSION

While the State's interest in protecting its confidential investigatory files is considerable, Petitioner's constitutional right to mount a complete defense when charged with a felony is entitled to greater weight. Where, as here, Petitioner's right to inspect physical evidence material to his determination of guilt or innocence is completely foreclosed by a judicially created gloss over the

relevant criminal rule of procedure, the principles of fundamental fairness dictate that a violation of due process has occurred. For these reasons, Petitioner respectfully requests the Court grant his petition for writ of certiorari.

Respectfully submitted,

Marc D. Mezibov*
Stacy A. Hinners
Law Office of Marc Mezibov
401 East Court St., Suite 600
Cincinnati, OH 45202
(513) 621-8800

**Counsel of Record*
Counsel for Petitioner

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